

August 7, 2003

The Honorable Les Brownlee
Under Secretary
United States Army
The Pentagon
Washington, D.C. 20310

Dear Under Secretary Brownlee:

I am writing to express serious concerns about the findings of a report issued by the National and Florida Wildlife Federations (WF) and the Council of Civic Associations, Inc., (CCA) of Estero, Florida, concluding that the Federal government is contributing to the creation of a potentially significant and costly problem in the Florida Everglades ecosystem, specifically in Southwest Florida. The report, *Road to Ruin: How the U.S. Government is Permitting the Destruction of the Western Everglades* (“Road to Ruin”), criticizes three Federal agencies¹ for failing to protect adequately the habitat and water resources of Florida’s Lee and Collier counties. It asserts that “[t]he same kind of misguided development that decimated the Eastern Everglades and left American taxpayers with an \$8 billion restoration bill is happening again in the Western Everglades,”² and faults the Corps of Engineers (Corps) for administering a lax Clean Water Act (CWA) permitting program (Section 404) which is “effectively draining and filling the wetlands of the Western Everglades. . . .”³

The Western Everglades are a valuable national resource where the Federal government invests in the area’s national refuges, preserves, and estaurine research reserves.⁴ *Road to Ruin* documents citizens’ concerns regarding losses of watershed and wetland function, of critical habitat for threatened and endangered species, and of clean water. Not only are there concerns about water quality in coastal areas, but the groundwater which supplies water to urban areas is affected by the failure to preserve the area’s natural vegetation. *Road to Ruin* concludes:

¹ The three agencies are the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency (EPA), and the U.S. Fish and Wildlife Service (FWS).

² National Wildlife Federation, Florida Wildlife Federation, and Council of Civic Associations, Inc., *Road to Ruin: How the U.S. Government is Permitting the Destruction of the Western Everglades*, November, 2002, at 1.

³ *Id.*

⁴ The major features of the area include, the Florida Panther National Wildlife Refuge, the Ten Thousand Islands National Wildlife Refuge, the Big Cypress National Preserve, the Fakahatchee Strand State Preserve, the Corkscrew Regional Ecosystem Watershed, the Rookery Bay and Estero Bay Aquatic Preserves, the Corkscrew Swamp Sanctuary, and the Picayune Strand State Forest. U. S. Army Corps of Engineers, Jacksonville District, *Environmental Impact Statement on Improving the Regulatory Process in Southwest Florida, Lee and Collier Counties, Florida*, July 2000, Sec. 3.1 (hereinafter “2000 EIS”).

At stake is the very heart of the Western Everglades Ecosystem: its clean water, cypress domes, seagrasses, wading birds, sport and commercial fisheries, and endangered species, including the Florida panther, the wood stork, and the manatee.⁵

The report sounds a caution against repeating past mistakes, noting the extraordinary high cost of undoing the damage once it is done.⁶

As Ranking Member of the Committee on Governmental Affairs, whose mandate includes the study or investigation of “the efficiency and economy of operations of all branches of Government with particular references to the operations and management of Federal regulatory policies and programs,”⁷ I am extremely troubled by the assertions that the Corps of Engineers and the other Federal regulatory agencies have failed to fulfill their statutory mandates, thereby endangering a valuable national resource, and troubled about the implications of this report for the future of our nation’s precious resources. Therefore, I have questions regarding both the efficiency with which both the Jacksonville District (“the District”) is administering the CWA Section 404 program as well as the oversight being exercised by the Corps of Engineers Command.

Highlights of Report

Briefly, the report focuses in part on an Environmental Impact Statement (EIS) which the District developed to analyze the cumulative environmental impact of its CWA permitting program in Southwest Florida. The purpose of the EIS was to address concerns that the Corps’ permit-by-permit reviews of Section 404 permit applications inadequately addressed the cumulative effects of filling wetlands in the rapidly growing area.⁸ To help insure appropriate review of each permit, the EIS developed standardized natural resources criteria regarding species, habitat, and water resources to be used in analyzing the impact of individual projects on the environment. Implementation of such criteria for reviewing permits would reduce fragmentation of the habitat and also assist permit applicants by reducing their costs and providing greater predictability regarding their ability to obtain Section 404 permits.⁹ In July 2000, the District announced that it would consider comments on the Final EIS and then issue a record of decision (ROD). (A record of decision is a public record of an agency’s decision, elaborating on the basis for the decision, and stating the alternatives considered and whether all practicable means to avoid or minimize environmental harm have been adopted.)¹⁰ To date, no ROD has been issued. Rather, according to the WF/CCA report, the District

⁵ *Road to Ruin*, Forward.

⁶ *Id.*

⁷ S. Res. 66, 108th Cong., 1st Sess. (2003)(Enacted).

⁸ The study area includes an area roughly defined by the cities of Ft. Myers/Sanibel, the northeast by Lehigh Acres/Immokalee, the southwest by Naples and the southeast by Everglades City. It includes temperate and subtropical habitat. 2000 EIS, Sec. 3.1.

⁹ 2000 EIS at i-ii.

¹⁰ 40 C.F.R. Sec. 1505.2.

has continued the very permitting practices which prompted concerns about cumulative environmental impacts in the first place. In fact, the report states: “developers are proposing to build even more projects in these key resource areas than they were before the Corps published the EIS!”¹¹

The report describes the loss of a minimum of 880 wetland/waters acres per year¹² and asserts that a variety of Corps practices are contributing to further losses. These include the following practices affecting wetlands, according to the report:

- * The District rarely exercises its permitting authority to require that developers avoid building in wetlands, notwithstanding regulatory prohibitions against issuing a permit where there is a practicable and environmentally preferable alternative to construction in wetlands;
- * The District makes determinations that wetland areas which are hydrologically connected are “isolated” and therefore not subject to regulation under the Clean Water Act in apparent conflict with Federal guidance and U.S. Supreme Court precedent. In fact, the Corps is actually creating “isolated” waters no longer subject to its jurisdiction because of its permitting practices; and
- * The District allows developers to renege on permit conditions in which they agreed to protect certain wetlands by allowing them to fill wetlands previously identified as mitigation for the loss of wetlands.

The report further asserts that while wetland losses are occurring, the “mitigation” projects that are approved are inadequate to offset losses:

Virtually all of this mitigation is in the form of preservation and ‘enhancement’ in the form of controlling exotic vegetation on wetlands placed under conservation easements or acquired outright. . . it does not offset the massive loss of other wetland acres and it does not achieve ‘no-net-loss’ of wetlands.¹³

The report also discusses the harm to Southwest Florida’s watersheds and historic flowways. For example, the EIS identified the maintenance and restoration of flowways¹⁴ as necessary to reduce the harmful impacts of area dredge and fill projects, but *Road to Ruin* states that the Corps has continued to approve projects that “will further destroy historic flowways, rather than

¹¹ *Road to Ruin*, at 6-7.

¹² According to *Road to Ruin*, with the addition of wetlands that the Corps labels as “isolated” and therefore not subject to regulation under the Clean Water Act after the U.S. Supreme Court decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), the loss rate is estimated to exceed 900 acres.

¹³ *Road to Ruin*, at 3.

¹⁴ Flowways are wetland watercourses that guide freshwater toward the Gulf Coast, store floodwater, supply water at times of low flow, filter pollutants, and support biologically diverse flora and fauna.

restore them.”¹⁵ In addition, the Corps’ practice of issuing Section 404 permits without assessing water quality impacts contributes to the degradation of water bodies which already do not meet federally-mandated water quality standards, including the Estero Bay and its tributaries and the Cocohatchee. This is due, the report asserts, to the fact that the Jacksonville District relies on water quality certifications which are based on the *assumption* that projects with conventional stormwater management systems will meet water quality standards.

Because of the potentially costly consequences of these practices for the health of our natural resources, the extensive Federal investment in preserves and wildlife refuges in the area, and the potential for high future restoration costs to taxpayers, I am interested in your response to the findings in the report as well as your answers to the questions contained below:

I. General response to the report

- A. Generally, how do you respond to the assertions contained in the report?
- B. Has the Jacksonville District made any changes, including in permitting practices, in response to the specific recommendations which were addressed to the Corps of Engineers in *Road to Ruin*?

II. Actions of the Jacksonville District

Status of the Southwest Florida Environmental Impact Statement and permitting practices

- A. In April 2001, the Jacksonville District held workshops to obtain public input on implementation of the 2000 EIS, but, to date, has not issued a ROD.
 - 1. Why not?
 - 2. What is the time schedule for signing a ROD?
- B. How do you respond to criticisms that despite having developed the environmental analysis contained in the EIS, the District continues to issue Section 404 permits for development which are resulting in the loss of wetlands at a rate that is the highest in the country and, in fact, higher than when the EIS was initiated?
- C. To date, how many Section 404 permits have been issued in the Southwest Florida EIS study area since July 2000?
- D. Since July 2000, how many applications for Section 404 permits in the EIS study area have been denied?
- E. How do you respond to the report’s assertion that the District is actually creating “isolated wetlands” because of its permitting practices?

¹⁵ *Road to Ruin*, at 8.

Jurisdiction over wetlands and public availability of information

- F.
1. As of July 2000, what was the total acreage of wetlands in the Southwest Florida EIS study area subject to the Corps' jurisdiction?
 2. In the wake a recent Supreme Court decision that the Corps' interpretation of its Section 404 authority over "isolated waters" exceeded the authority granted by the statute, in January 15, 2003, the Corps and the Environmental Protection Agency issued preliminary guidance for the regulated community regarding the scope of CWA jurisdiction.¹⁶ (The interpretation that the Supreme Court found unacceptable in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 521 U.S. 159 (2001) ("SWANNC") was that CWA included jurisdiction over waters because of their actual or potential use as habitat for migratory birds that cross state lines in the migration.)

Applying the guidance issued in January 2003, what is the current acreage of wetlands in the EIS' study area that is subject to the Corps' jurisdiction?
 3. For those wetland areas in which the District has determined that it no longer has jurisdiction in accordance with the January, 2003 guidance, identify the location and amount of the acreage affected, and the factual basis supporting the determination that the acreage is no longer subject to the Corps' jurisdiction.
 4. The January guidance further provided that in those cases where the reach of the Court's decision is not settled, the Corps' field staff is to seek formal project specific approval from headquarters.
 - (a) Identify by project all instances since issuance of the January guidance in which the District staff sought formal project-specific approval from headquarters.
 - (b) For each project, identify whether or not the project was approved.

G. *Road to Ruin* states that the Corps makes "no jurisdiction" determinations – that is, it decides that a Section 404 permit is not required because the water in question is not a water of the United States – at the "behest of developers without any notice to the public or consultation with EPA."¹⁷

1. Please describe in detail how the District makes such determinations.
2. What records are kept regarding these determinations?

¹⁶ A joint Memorandum issued by EPA and the Corps of Engineers stated that SWANCC precludes extending the CWA over intrastate and non-navigable waters where the sole basis for asserting jurisdiction is the actual or potential use of the waters as habitat for migratory birds that cross state lines in the migrations. 68 *Fed. Reg.* 1991 (January 15, 2003).

¹⁷ *Road to Ruin*, at 6.

3. Are these records available to the public, and, if so, how?

H. *Road to Ruin* also states that the District had not responded to a request from the Estero Bay Agency to document the number, acreage and location of wetland areas in the Estero Bay watershed where Federal jurisdiction has changed or is under consideration for change.

1. Has the District provided the requested information?
2. If not, why not?

I. What will the District now do to make information available to the public regarding the location and acreage of wetlands within the Jacksonville District which are subject to its jurisdiction under the Section 404 program?

Implementation of mitigation agreements

- J.
 1. Identify all instances since July 2000 in which the District has excused regulated entities from compliance with or failed to enforce agreements to protect wetlands.
 2. For each such instance, please state the legal authority for doing so.

Maintaining flowways

K. The EIS identified conditions which could be imposed on permits to maintain and restore historic flowways.

1. Identify all permits (including the date) issued since July 2000 by the District that contain conditions designed to maintain and restore historic flowways, including a brief description of the conditions and their expected impact.
2. What action has the Corps taken to insure compliance with such permit conditions issued since July 2000? Please be specific.

Panther habitat

- L.
 1. Since November 2002, how many Section 404 permits have been issued for activities within the area identified in the map in Appendix H, "Florida Panther," in the Southwest Florida EIS?
 2. For each permit, describe the activities that were authorized and the impact on panther habitat.
- M.
 1. Please describe the program established by the District for conservation of the panther in accordance with Section 7(a)(1) of the Endangered Species Act.¹⁸

¹⁸ 16 U.S.C. Sec. 1536(a)(1).

2. When did consultation with the Fish and Wildlife Service occur on this program?

III. National oversight

A. What actions will you take to insure that the Jacksonville District adequately exercises its regulatory authority to insure protection of wetlands, flowways, and water quality?

B. What will you do to address criticisms that the Jacksonville District continued to issue permits at a higher rate than when the EIS was initiated?

C. What will you do about the reported high rate of the loss of wetlands in the area covered by the Southwest Florida Study Area EIS?

D. As noted above, *Road to Ruin* asserts that the Jacksonville District has allowed developers to renege on permit conditions in which they agreed to protect certain wetlands. Do you concur that it is appropriate to allow “mitigation” wetlands to be filled? If so, what is the legal basis for doing so? If not, what action will you take to address the problem of “mitigation” wetlands being filled in the Jacksonville District?

F. 1. What action are you taking to insure that determinations that acreage is no longer subject to the Corps’ jurisdiction are factually supported?

2. The Corps is receiving public comment on the January guidance on *SWANNC* and has not stated a position regarding any changes it may make. Pending further action to change the guidance, what specific criteria are you using to decide whether the CWA applies to bodies of water where the reach of *SWANNC* is not clear?

G. As noted above, the Estero Bay Agency was unable to obtain information regarding changes in Federal jurisdiction over wetlands. This is not a problem unique to Florida: for example, a news report regarding wetlands along the Texas coast discussed the difficulty the public encounters in obtaining information regarding the extent and location of wetlands over which the Corps has jurisdiction.¹⁹

1. In each of the Corps’ Districts in the country, what actions are you taking to insure the availability to the public of information (with reference to the specific acreage and location of the wetlands) regarding the current status of Corps’ jurisdiction over wetlands?

2. Has the Corps reviewed permitting practices in each of the Districts throughout the country to determine if, by their permitting practices, individual districts are creating “isolated wetlands”?

¹⁹ Douglas Jehl, “Chief Protector of Wetlands Redefines Them and Retreats,” *The New York Times*, February 11, 2003 at A-1.

3. How extensive is this practice, and what corrective action will you take?

As I am sure you will agree, throughout the country, wetlands perform functions vital to water purification, food production, and the preservation of resources. Yet they continue to disappear. I look forward to receiving your answers to my questions regarding what actions the Corps is taking to keep track of and stem the losses of wetlands in Southwest Florida and throughout the country.

Sincerely yours,

Joseph I. Lieberman
Ranking Member

JIL:kjs

Enclosure:

Road to Ruin: How the U.S. Government is Permitting the Destruction of the Western Everglades